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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE APPLICATION OF
LETHA M. HINES
ROBB E. OLSEN
SERIAL NO.: 08/383,550
FILED: FEBRUARY 3, 1995
FOR: SANITARY NAPKIN HAVING
CORE PREDISPOSED TO A
CONVEX UPWARD
CONFIGURATION
P&G CASE: 5006C

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GROUP ART UNIT: 3308
EXAMINER: CHO

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GROUP 3300

APPEAL BRIEF

The Assistant Commissioner for Patents
Washington, D.C. 20231

Dear Sir:

Enclosed are triplicate copies of Appellant's Appeal Brief. The authorization to charge the fee for filing this Brief was provided with the Notice of Appeal.

1. Real Party In Interest

The real party in interest is The Procter & Gamble Company.

2. Related Appeals and Interferences

None.

3. Status of Claims

Claims 1, 4-9, 12-17, and 19 are finally rejected under 35 U.S.C. §103 and appealed.

4. Status of Amendments

Claims 1, 12, 15, 16, and 17 were amended after final. The amendments were entered.

5. Summary of the Invention

The invention is a sanitary napkin 20 (Fig. 1:20; 4:17-25). The sanitary napkin 20 (Fig. 1:20; 4:17-25) has a longitudinal centerline O-O (Fig. 2; 4:38-5:5) and a lateral centerline A-A (Fig. 2; 5:5-10) orthogonal to the longitudinal centerline O-O (Fig. 2 4:38-5:5).

The sanitary napkin 20 (Fig. 1:20; 4:17-25) comprises a liquid pervious topsheet 24 (Fig. 1:20; 4:17-25; 7:13-22), a liquid impervious backsheet 26 (Fig. 1:20; 4:17-25; 6:18-7:12), and an absorbent core 28 (Fig. 1:20; 4:17-25; 5:29-6:17) intermediate the topsheet 24 (Fig. 1:20; 4:17-25; 7:13-22) and the backsheet 26 (Fig. 1:20; 4:17-25; 6:18-7:12). The core 28 (Fig. 1:20; 4:17-25; 5:29-6:17) has two major faces, a first major face oriented towards the topsheet 24 (Fig. 1:20; 4:17-25; 7:13-22) and a second major face oriented towards the backsheet 26 (Fig. 1:20; 4:17-25; 6:18-7:12). The first major face of the absorbent core 28 (Fig. 1:20; 4:17-25; 5:29-6:17) has a discontinuous line of weakness 30, 30' (Fig. 2:T; 8:18-26; 10:30-37) therein. The line of weakness 30, 30' (Fig. 2; 8:18-26) is longitudinally concave towards the lateral centerline A-A (Fig. 2; 5:5-10; 8:32-35) and comprises discrete sites 36 (Fig. 2; 9:26-10:28). The discrete sites 36 (Fig. 2; 9:26-10:28) are bilaterally staggered (10:30-37) about the lines of weakness 30, 30' (Fig. 2; 8:18-26), wherein the sanitary napkin 20 (Fig. 1:20; 4:17-25) deforms to a convex upward configuration (Fig. 4; 8:26-31) while in use.

6. Issues

1.   Are Claims 1, 4-9, 12-17, and 19 obvious under 35 U.S.C. §103 over Buell (U.S. 5,197,959) in view of Glassman (U.S. 4,758,240) and Sneller (WO 93/12747)?

7. Grouping of Claims

The claims stand or fall together.

8. Argument

As explained by Examiner Cho in the telephonic interview, Glassman (Figs. 3-4) teaches of discrete sites in a core. The discrete sites of Glassman are applied to Figs. 6, 23B-23C, and 28 of Buell in an attempt to arrive at the claimed invention.

Sneller (para. bridging pp.18-19) is relied upon for its teaching of producing controlled bunching. Sneller thereby, allegedly, provides the motivation to apply the Glassman discrete sites to the aforementioned figures in Buell.

It is undisputed that if one selects the wrong figures of Buell, the claimed invention does not result. For example, Buell Figs. 14-15 have the wrong concavity. One must know (somehow) to ignore the concave upwards teachings in Buell.

Assuming *arguendo*, there is motivation to combine these references, one must then choose the proper arrangement of discrete sites from the Glassman array to produce the claimed line of weakness. Examiner Cho twice acknowledged in the telephonic interview there are between "one and an infinite number" of lines of weakness which could be selected from the Glassman teaching.

Requiring one of ordinary skill to select from between "one and an infinite number" of lines of weakness, is a *prima facia* return to the forbidden "obvious to try" standard. One of ordinary skill selecting from one to an infinite number of possible lines of weakness would *not* consider the proper selection to produce the claimed invention to be an obvious choice.

But, the rejecting combination suffers from more serious deficiencies. Assuming one of ordinary skill:
1)	desired Sneller's controlled bunching, and
2)	selectively picked (and selectively ignored) the proper figures of Buell, and
3)	properly chose between "one and an infinite number" of Glassman's discrete sites, the claimed invention still does not result.

As acknowledged by Examiner Cho, one using Glassman to arrange the discrete sites to form the lines of weakness would have lines of weakness passing *through* the discrete sites. This disposes the discrete sites *on* the line of weakness - in contrast to the claims which require the discrete sites to be *bilaterally staggered about* the line of weakness.

The distinction between placing the discrete sites *on* the line of weakness and bilaterally staggering the discrete sites *about* the line of weakness is set forth in the Specification (10:35-37). Bilaterally staggering the discrete sites provides a more gradual bending axis, improves the resiliency of the sanitary napkin, and provides a fuller target area to intercept menses.

Even if one makes the Examiner's combination, having the benefit of knowing to make the claimed combination from the three cited references, the claimed invention does not result. An invention which does not result from the prior art combination cannot be obvious thereover.

SUMMARY

There is scant, at best, motivation to combine Glassman with Buell in view of the teaching of Sneller. Once one makes this combination, he or she must select the convex upward teachings of Buell and ignore the convex downward teachings of Buell.

Then one must select from the admittedly infinite number of lines of weakness of Glassman and apply the correct arrangement to the convex upward teaching of Buell.

Even when one picks and chooses among all of these possible combinations, the claimed invention still does not result. The claimed invention is not obvious. This Board is respectfully requested to reconsider and allow Claims 1, 4-9, 12-17, and 19.

Respectfully submitted,

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